No. 5280

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC, a corporation,

Complainant Below,
Appellant,

vs.

TITLE GUARANTEE & TRUST COMPANY, a corporation; THE MORTGAGE CORPORATION OF AMERICA, a corporation, and THERON WALKER, styling himself and doing business as THERON WALKER ENGINEERING & CONSTRUCTION COMPANY,

Defendants Below,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

Brief For Appellant

Maynard F. [illegible], Esq.,
[illegible], Esq.,
Law Building, [illegible] North Broadway,
Los Angeles, California.
Attorneys for Appellant.

[illegible]

TABLE OF CONTENTS

TABLE OF CITATIONS

No. 5280

United States

Circuit Court of Appeals

NINTH CIRCUIT

PARAMOUNT MOTORS CORPORATION OF THE PACIFIC, a corporation,
Complainant below,
Appellant,

vs.

TITLE GUARANTEE & TRUST COMPANY, a corporation, et al.,
Defendants below,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Brief For Appellant

STATEMENT OF THE CASE

This is an appeal from a decree entered July 7th, 1927, in effect dismissing complainant's amended bill upon the hearing, and is the second appeal by complainant. The former appeal was from a decree dismissing the same amended bill for alleged want of equity on motion to dismiss, and that action was reversed by this Court and the cause was remanded. The cause

was No. 4858 of this Court and is reported in 15 (2nd) Fed. 298, and we reproduce therefrom and adopt, as part of this statement, the summary of the amended bill made by the Court in its opinion, as follows:

"The allegations of the amended complaint are substantially these:

"That prior to November, 1924, the appellant was the owner of a 20-acre tract in Los Angeles County, Cal.; that on November 28, 1924, it entered into a contract with one Theron Walker, under the designation Theron Walker Engineering & Construction Company, to furnish the labor and material for the construction of a building on the tract for the sum of $17,000; that, before entering into the construction contract, Walker represented to the appellant that one Seaton would advance the money to cover the cost of constructing the building, taking notes of the appellant therefor amounting to $17,000; that the appellant accordingly, and at the instance and request of Walker, executed to Seaton two promissory notes, for $12,500 and $4,500 respectively, and secured the same by a deed of trust on the 20-acre tract, executed by the appellant in favor of the Title Guarantee & Trust Company, as trustee, for the benefit of Seaton; that, notwithstanding the execution of the notes and deed of trust, Seaton paid no money or other thing of value therefor, and failed to finance the building project; that on December 4, 1924, Seaton assigned the notes and deed of trust to Theron Walker Engineering & Construction Company, without recourse; that Seaton was the nominee and agent of Walker in the transaction; that after the assignment of the notes and deed of trust to Walker he appellant assigned to

him, under the designation of Theron Walker Engineering & Construction Company, claim and demand in the sum of $11,965 against the Paramount Heights Subdivision as payment *pro tanto* upon the two notes, and the assignment was so accepted by Walker; that no application of the payment thus made was directed by the appellant, but the appellant is informed and assumes that the payment was applied upon and extinguished the $4,500 note, leaving the balance to be applied on the $12,500 note, and that not more than $5,000 is now due upon the latter, together with a small amount of interest; that on December 18, 1924, Walker, under the name of Thereon Walker Engineering & Construction Company, assigned and transferred the $12,500 note and his rights under the deed of trust securing the same to the Mortgage Corporation of America, and assigned to the same corporation the claim of $11,965 against the Paramount Heights Subdivision; that Seaton paid no money or other consideration on account of the execution of the promissory notes, and the appellant received no consideration on account thereof, except the building contract and the work done thereunder; that Walker paid no consideration to Seaton for the assignment of the notes, and the Mortgage Corporation of America paid no consideration to Walker, but took the assignment under an agreement to pay certain claims and demands. It is then averred that, notwithstanding the premises the Mortgage Corporation of America has made demand upon the trustee to foreclose the deed of trust for default in the payment of the $12,500 note and interest; that the trustee has filed in the office of the couny recorder of Los Angeles County a notice of such

default; and that the appellees are threatening to and will sell the property covered by the trust deed to satisfy the full amount of the note, unless restrained from so doing by order of court."

Upon receipt of the mandate showing that the decree of the District Court had been reversed, that Court entered its order overruling the motion to dismiss, and filing the answer of Title Guarantee & Trust Company and Mortgage Corporation of America, (R. 3).

THE ANSWER (R. 4) contains three separate purported defenses to the amended bill. The first of these is an attempted traverse of the allegations of the bill, except the jurisdictional ones and except that it admits that Walker assigned the $12,500 note and mortgage to the Mortgage Corporation, that $750 in interest was paid upon it, and that the defendants claim the full $12,500 and are proceeding to foreclose the deed of trust, and denies that the $11,965 claim was assigned to Walker as payment on the notes held by him or was accepted as such payment. The second defense is a demurrer.

In the Third Defense (R. 10), defendants aver that on November 24, 1924, complainant and Walker entered into a contract for the construction of a factory building on the land referred to for the sum of $17,000 to be paid to Walker in notes for $12,500 and $4,500 secured by a first and a second deed of trust respectively upon the premises, these notes to be received by Walker "in full payment for all work, labor, and material to be furnished in the erection of said building," and afterwards, on December 1st, 1924, in pursuance of said contract and as part payment of the considera-

tion to be paid Walker, complainant issued its note for $12,500 "payable to a nominee of said Walker, one H. E. Seaton," which note was secured by deed of trust conveying said land to Title Guarantee & Trust Company, a copy of which note, with the assignments thereon, is set out in said answer; that on December 18th, 1924, Walker, "in the ordinary course of business," offered said note for sale to Mortgage Corporation of America and sold same to said corporation, representing that this note was part of the consideration to be paid under the building contract, for the sum of $10,000 to be paid to said Walker by said Mortgage Corporation upon his order and demand as said building "was progressively completed," final payment to be made when notice of completion should be filed and a guarantee furnished that the building was free from building liens, which sum of $10,000 was afterwards paid; that at the time of the sale of said note by Walker to the Mortgage Corporation, complainant by its proper officers executed to said corporation an "offset statement and representation of indebtedness," a copy of which statement is set out in the answer; that said note was payable at the rate of $800.00 or more on the first day of each month from August to December, 1925, at which time the balance of $9,300.00 should be paid, and complainant paid the quarterly installments of interest due until September 1st, 1925, but no payments upon the principal were made, but complainant continued in default until October 21st, 1925, when the Mortgage Corporation made demand upon the trustee, declaring all the indebtedness due and payable at once, and filed in the County Recorder's office notice of its election to have

the property sold, and the trustee was required under the law to proceed within three months to sell the said property, and did accordingly publish notice of proposed sale. And the defendants aver that nothing has been paid on said note except said interest installments and that the whole principal and the interest at eight per cent since September 1st, 1925, is now due.

In April, 1927, this cause came on for hearing and much evidence was introduced, and among other things the relation of H. E. Seaton to the transactions in question and his apparent want of participation therein were disclosed, and after the close of the evidence the complainant on May 2nd, 1927, tendered to the Court and asked leave to file an

Amended and Supplemental Bill (R. 19) in which, after summarizing all the allegations of the previous amended bill and reaffirming them, except so far as they may be varied or modified by the amended and supplemental bill, it is averred, by way of amendment and supplement to said amended bill, that in all the dealing in reference to said notes the officers and agents of complaintant never came into personal contact or direct communication with Seaton and had no knowledge or information concerning him except such as was derived from Walker, who represented that Seaton was a moneylender who would provide the money for financing the building under contemplation, and with that understanding complainant executed the said notes to him, but afterwards and during the pendency of this suit the defendants filed therein an affidavit of Walker stating, among other things, that Seaton was "the nominee and agent" of Walker, and complainant, assuming that to be

true, averred in its amended bill, subsequently filed, that Seaton was such nominee and agent, and assuming from the face of the papers and the claims of the defendants that Seaton had actually assigned said notes and deeds of trust to the Mortgage Corporation of America, averred that Seaton had so assigned them, but, that later and since the taking of the evidence herein, on April 8th, 1927, complainant had been informed and now avers that Seaton was not the agent of Walker, that he never assigned or otherwise transferred said notes to Walker or The Theron Walker Engineering Company or to anyone else and never authorized Walker or anyone else to assign said notes or take any action whatever in his, Seaton's, name in the premises; wherefore, no title to said $12,500 note passed to Walker or to Mortgage Corporation of America, by the pretended or attempted assignment thereof.

Said Amended and Supplemental Bill further averred that prior to the commencement of the suit the trustee in said deed of trust had published notice of intended sale of said twenty acres of land, at the instance of Mortgage Corporation of America, claiming that there was due the full sum of $12,500.00 and certain interest and alleged disbursements and expenditures aggregating $500.00 or $600.00 additional, and upon the filing of the bill herein the sale was suspended, but upon dismissal of the amended bill on motion to dismiss, notice of proposed sale was again published, in which the amount claimed to be due was stated to be the sum of $15,729.37, and it was recited that the Mortgage Company "has been obliged to and has paid out and advanced the sum of $2,579.43 for the purpose of protecting the

interests of the trust, said payment and advancement having been made in accordance with the provisions of said trust deed," which threatened sale was enjoined by the Circuit Court of Appeals, pending the hearing of the appeal from the decree dismissing said amended bill, but the defendants still make claim to said sum of $15,729.37. The complainant further avers, upon information derived from defendants' counsel, that $2,000.00 of the $2,579.43 alleged to have been paid out by said Mortgage Company "for the purpose of protecting the interests of said trust," consisted of fees allowed to counsel for defending this suit and not for any purpose of defending the interests of the trust; that said sum was fixed, allowed, and paid (if paid) without the authority, consent or knowledge of complainant, and the only suit which the trustee or the beneficiary under said trust deed was authorized to defend at the expense of the trustor was "to protect the title" to the property conveyed by the trust deed, and no such suit ever had been brought; and that the defendants have no rights under said trust deed, but if they have, and whatever else it may be, said $2,000.00 charge is illegal and without color of authority, notwithstanding which want of any right in the premises the Mortgage Company is claiming the said sum of $15,729.37 or more, on account of said $12,500.00 note, and said defendant and the Trust Company are threatening to enforce said unlawful claim by a sale of complainant's land and buildings.

Complainant, protesting that the defendants have no rights or valid claims against complainant under said note and deed of trust, nevertheless offers to do and

abide by whatever justice and equity may require of complainant in the premises, and prays that it be adjudged that complainant is not indebted to Mortgage Corporation of America in the sum of $12,500 or the sum of $15,729.37, or any other sum, that the defendants have no rights against complainant under said trust deed and that they be enjoined from prosecuting any proceedings thereunder, and for general relief.

In support of the motion for leave to file said amended and supplemental bill, complainant filed the affidavit of S. S. Smith, vice-president of complainant, (R. 29), tending to sustain the allegations of the bill with reference to the relation of Seaton to the note transaction, and the defendants filed the affidavits of Walker, (R. 31) and Seaton (R. 33) in contradiction thereof, and complainant filed the reply affidavit of Smith, detailing an interview with Seaton upon which the bill was largely based (R. 35), the affidavits of L. W. Coffee, (R. 38) and R. E. Clapp (R. 39), supporting the bill.

On June 24, 1927, the Court denied the motion for leave to file (R. 19) and on July 7th, 1927, entered its decree whereby it finds that the complainant "has not maintained the material allegation of its amended billl by a preponderance of evidence" and "specifically finds that any assignment made by plaintiff to Theron Walker was assignment as collateral only, and not as payment," and decrees that complainant take nothing (R. 41).

From this decree complainant appealed to this Court, assigning numerous errors, (R. 42, 47) September 13, 1927, but in the meantime the defendants renewed their notice of foreclosure sale, enlarging the amount which they proposed to enforce against complainant's land from

the not too modestly extortionate sum of $15,729.37 to the preposterous demand of $19,547.39, based on the note for $12,500.00. The sale was stopped by this Court at the September term at Seattle.

Upon the hearing, complainant proved all the allegations of the amended bill not admitted by the pleadings, or otherwise, by the testimony of R. E. Clapp, managing director of complainant, and by certain documentary evidence and rested. Much evidence, oral and documentary, was introduced by the defendants, very little of which had any appreciable relation to the issues and most of it none whatever. The statement of the evidence proposed by appellant erred on the side of liberality and the praecipe for the record (R. 148) called for the printing of all the exhibits which it was believed the Court would need to refer to, but at the instance of appellees (R. 149) others, covering 55 pages, were printed.

The defendants offered in evidence the so-called "offset statement" set out in the answer, Exhibit C (R. 107) and complainant objected, but the Court admitted it, and later overruled complainant's motion to strike it out.

The defendants also introduced in evidence, over complainant's objection to its materiality, the notice of the time when the building constructed by Walker was completed, Exhibit E (R. 108). Complainant objected to the admission in evidence of a certain so-called "Stop Order" (R. 70), by which one Lack forbade the Bank of America to pay out any improvement funds of Trust 243 without Lack's prior approval, but the paper was admitted in evidence. There were also admitted in evidence over complainant's objection to their competence

or materiality, sundry other papers which were made the ground of exception.

SPECIFICATION OF ERRORS RELIED UPON

First: The Court erred in admitting in evidence, at the instance of the defendants and over the objection of the complainant, the paper called "Owner's Offset Statement" (defendants' Exhibit "C") signed by Paramount Motors Corporation of the Pacific, by Chas. H. Norton, Sec'y., addressed to Union Bank & Trust Company of Los Angeles, at the latter's request, stating that said Paramount Motors Corporation of the Pacific is the maker of the promissory note dated December 1st, 1924, in favor of H. E. Seaton and secured by a deed of trust upon a twenty-acre tract of land, describing it; that said maker is the owner of said premises; that the unpaid balance of said note is $12,500; that the interest on said note is unpaid; that said maker has no offsets, claims nor defense to said note, and that said note and trust deed have been assigned and the new owner's name and address is Mortgage Corporation of America, 310 Union Bank Building, Los Angeles, California; which paper was offered for the purpose of showing that the complainant was estopped to claim any credit upon or offset to or defense against said note.

The Court erred in admitting said paper in evidence, it appearing upon its face to be addressed to a stranger to the transaction, the Union Bank & Trust Company, and not to defendant, Mortgage Corporation of America, or to anyone under whom it claims, it further appearing from the face of said paper that the Mortgage Corporation had already acquired said note, and there being no

claim of estoppel set up in the answer nor anything alleged therein as a foundation for such claim.

Second: The Court erred in over-ruling complainant's motion to strike out the above mentioned "Owner's Offset Statement," defendants' witness having testified that the Mortgage Corporation had purchased the $12,500 note before it received said statement.

Third: The Court erred in admitting in evidence, at the instance of the defendants and over the objection of the complainant, the Notice of Completion, "Defendants' Exhibit E," being an affidavit of the managing director of complainant that the building on said twenty-acre tract of land, contracted to be built by Theron Walker Engineering & Construction Company, was completed January 31st, 1925; the said paper and fact or date of completion being immaterial to any issue in the case.

Fourth: The Court erred in admitting in evidence, at the instance of the defendants and over the objection of complainant, the so-called "Stop Order," a paper purporting to be signed by one F. S. Lack, dated January 18th, 1926, addressed to Bank of America, ordering said Bank not to pay out any funds for improvements in respect to Trust 243 (being the trust a claim against the "improvement fund" of which had been assigned) unless such payment shall have been approved by said Lack, and attempting to authorize the payment of certain small items to sundry persons; the said paper being incompetent and immaterial and irrelevant to any issue in the case. It was not shown that Lack had any authority in the premises or that any action was taken on the order.

* * * * * * * * *

Seventh: The Court erred in refusing leave to com-

plainant to file the amended and supplemental bill tendered to the Court and in refusing to entertain said bill.

Eighth: The Court erred in finding and decreeing that the complainant had "not maintained the material allegations of its amended bill by a preponderance of the evidence."

Ninth: The Court erred in finding "that any assignment made by the plaintiff to Theron Walker was assignment as collateral only, and not as payment."

Tenth: If the assignment of the $11,965.00 demand was "as collateral," the Court erred in leaving the defendants free to sell complainant's land for the full amount of the $12,500.00 note without first resorting to a sale of the collateral.

Eleventh: The Court erred in permitting the defendants to go on with sale of complainant's land for the full amount of said $12,500.00 note without surrendering or in any manner accounting for the $11,965.00 demand still held by them, whether as collateral or otherwise.

Twelfth: The Court erred in permitting the defendants to proceed with the sale of complainant's land to enforce payment, not only of the full amount of said $12,500.00 note, without deduction of or accounting for the said $11,965.00, but for the further sum of $2,579.43, of which the sum of $2,000.00 is for counsel fees in this suit, added by the trustee without complainant's consent and without authority of law therefor.

Thirteenth: The Court erred in decreeing in favor of the defendants and in denying to complainant the relief prayed for or any relief.

Fourteenth: The Court committed other errors to com-

plainant's prejudice apparent upon the face of the record.

ARGUMENT

We will discuss the errors complained of in their logical, rather than in their chronological order, and the first to claim consideration would seem to be the

REFUSAL TO ENTERTAIN THE AMENDED AND SUPPLEMENTAL BILL

There were two separate matters presented by the amended and supplemental bill that seem to us of such importance as to demand the attention of the Court, neither of which could be presented by the former pleadings, because one of them was of subsequent discovery and the other of subsequent occurrence.

AS TO FICTITIOUS PAYEE

When the original bill herein was filed, complainant, supposing that Seaton in the beginning had been a vital factor in the transaction but had failed to carry out the part he had assumed to play and had assigned the notes made to him by complainant, thought it proper to make him a defendant in the bill, although he apparently had no longer an interest in the matter in controversy, and this was done in order that he might appear, if so disposed, but process was not served upon him as neither his personality nor his whereabouts was known to complainant.

When later in the case it was stated in an affidavit of Walker that Seaton was merely Walker's agent and nominee, it being deemed proper to file an amended bill, Seaton was so designated therein, but was omitted as a party.

When upon the hearing Walker testified that Seaton was "merely a name—a dummy, you might say, that I used to negotiate certain papers for me," but was an actual person and employed at Bullock's, in Los Angeles, (R. 80), he gave complainant for the first time information as to his status and whereabouts. Thereupon Mr. Smith, the vice-president of the complainant, interviewed Seaton and was informed by him that he never had been the agent of Walker, that he never had signed or otherwise transferred the note in question to Walker or to any other person, and had never authorized the same to be done by Walker or any other person, (R. 29). It then seemed desirable to present to the Court by a further amended and supplemental bill the altered situation of the case, which was done, together with the affidavit of Mr. Smith.

Upon the filing of the affidavit of Mr. Smith, the defendants submitted the affidavit of Walker, in which he claimed that Seaton was a friend "of long standing, over seven years," who had consented to "the use of his name as a dummy or nominee or agent;" that he had informed Mr. Clapp that Seaton was to act as such dummy, and that after the delivery of the notes to Walker, Seaton had called at his office and executed the assignment of them, (R. 31); and the affidavit of Seaton (R. 33) to the effect that he had executed the assignment of said notes in Walker's office. He says that about April 10, 1927, some person whose name he does not recall inquired of him at his place of employment about his signature or endorsement upon a certain $12,500 note and that he told him "he did not recall having had any part in any such transaction," but since then his recol-

lection had been refreshed by a proposed affidavit mailed to him by "said person," and "he now recalls the transaction with reference to placing his signature below the endorsement on the reverse side of said notes."

Thereupon complainant submitted the further affidavit of Mr. Smith (R. 35) in which he details the exact conversation had with Seaton, after introducing himself to Seaton and stating his position with Paramount Motors Corporation of the Pacific:

> Q. Do you know anything about the Paramount Motors Corporation of the Pacific?
>
> A. Is it a local concern?
>
> Reply: Yes.
>
> A. I do not.
>
> Q. Do you know Theron Walker or the Theron Walker Engineering and Construction Company?
>
> A. No.
>
> Q. Did you during the month of November, 1924, authorize said Theron Walker to have notes made to you by the Paramount Motors Corporation of the Pacific in the sum of $12,500 and $4,500, and later assign those notes to the said Theron Walker Engineering and Construction Company?
>
> A. Had that been done and the notes were good, I would not be here.
>
> Q. Then I take it you did not?
>
> A. No.
>
> Q. Are you, Mr. Seaton, or were you during the month of November, 1924, a money lender?
>
> A. No.

Complainant also submitted the affidavit of R. E. Clapp, (R. 39), who had conducted the dealings with Walker, in which he stated that "at all times and during all negotiations, Walker was insistent that H. E. Seaton was an actual investor and capitalist, and never at any time in writing or by information did affiant understand that Seaton was not actually interested until affiant read

Walker's affidavit in which Walker declared that Seaton was a mere nominee"—meaning the affidavit filed on the application for injunction and before the filing of the amended bill, and which led to the amendment with reference to Seaton. Clapp had already testified that "Walker never stated that Seaton was a dummy or a nominee of himself, nor anything like it. He did not mention the use of a nominee or dummy at all. Seaton was to be the principal of the deal." (R. 56.)

The evidence is overwhelming that Mr. Clapp and the officers of complainant understood the status of Seaton just as Clapp states it. They all acted upon that theory. The original bill, a vertified, serious document prepared by counsel upon information furnished by Mr. Clapp, was framed upon that theory and the amended bill conformed to the changed understanding. It is absurd to assert that complainant was dealing, knowingly, with make-believes or dummies; there was no known or apparent reason for doing so and no sense in doing so, whatever may have been Walker's own purpose or idea.

We submit that the tendered amended and supplemental bill, which is duly verified, and the affidavits in support of it present such a *prima facie* case with reference to Seaton's status and actions that the bill should have been traversed by an answer, if at all, and not by ex parte affidavits, so that the witnesses could be brought before the Court for examination and cross-examination, if Seaton's status has the importance which we attach to it.

IMPORTANCE OF SEATON'S STATUS

The district judge did not announce any opinion in passing upon the motion, but his question, "What dif-

ference does it make?" whether or not Seaton was Walker's agent, or had authorized Walker to act for him, or whether or not he had signed a transfer of the notes, implied that it made no difference. And so, we conceive that his Honor was in error.

It makes the difference that if the note in question is not voidable for want of consideration, none having passed from Seaton, and is not invalid or inoperative for other reasons, Seaton and not the Mortgage Corporation of America is the owner of this note.

In asking the above question the Court probably had in mind the principle of the law of commercial paper, that where the maker of a note or bill makes the same payable to a purely fictitious payee or to an existing person who has no interest in the bill or note, the paper becomes in effect payable to bearer. But to have this effect the maker *must know* at the time, that the payee is non-existent or has no interest in the matter. The authorities to this effect are multitude.

In *Corpus Juris* (8 C. J. Section 305) it is said:

> "Whether the paper is to be considered as having a fictitious payee depends on the knowledge or the intention of the party against whom it is attempted to assert the rule, and not on the actual existence or non-existence of a payee of the same name as that inserted in the instrument."

It is further said that under the negotiable instrument law the bearer of a check made to a fictitious payee cannot recover unless he proves that the maker *had knowledge* of the fiction.

Boles vs. Harding, 201 Mass. 103, 72 N. E. 481.

A note payable to the order of a fictitious or non-

existing person, *such fact being known* to the person making it, is payable to bearer.

McLaughlin, Gormley-King Co. vs. Hauser, (Iowa 1923) 191 N. W. 880.

It is only when the maker of a negotiable instrument *knows* that he is making it payable to a fictitious person that such note may be treated as payable to bearer.

Seaboard National Bank vs. Bank of America, 193 N. W. 26, 22 LRA (N. S.) 499.

The rule that a negotiable instrument made payable to a fictitious person is payable to bearer applies only where the maker *knowingly* makes it payable to a fictitious person.

Armstrong vs. Pomeroy National Bank, 46 Ohio St., 512, 22 N. E. 866, 6 LRA 625.

A check made payable to a fictitious or non-existing person *with knowledge that no such person exists* makes the check payable to bearer.

Snyder vs. Corn Exchange National Bank, 70, 167, 100 Atl. 269.

ENDORSEMENT OF NAME OF FICTITIOUS PAYEE DOES NOT PASS TITLE

Where the fictitious character or the non-existence of payee was not known to the maker of a note so as to make it payable to bearer, no one is authorized to endorse the note in the name of the fictitious or non-existing person, and a purported endorsement in such a case is without authority and inoperative.

McLaughlin, Gormley-King Co. vs. Hauser, Supra.

> "The forgery of the name of payee of a bill or note is a good defense to the action against him, even by a bona fide holder for value before maturity, as no title can be acquired by such endorsement.

> Thus where a draft was made payable to a fictitious person, without the drawer's knowledge, the endorsement of such fictitious person's name by the purchaser of the draft would be a forgery, and would confer no title."

2 Defenses to Commercial Paper, Joyce, Section 196.

Corpus Juris (8 C. J. P. 179) after defining liability of the maker of a note or bill in certain cases says:

> "But if the payee is a real person intended by the drawer to be the payee, he is not a fictitious person, and the drawer is not liable to one who claims under a forged endorsement of the payee's name, although the payee really had no interest in the instrument."

Citing, *Vinden vs. Hughes,* 1. K. B. 795.

When the notes in question in this case were made by the complainant, complainant's agents fully supposed that the payee was an actual person and had *an actual interest* and was to become the owner of the notes and all benefits under the deeds of trust, and was to supply funds needed for constructing the building in question. The status of the notes was then and there fixed, whether in fact the payee intended to be an actual factor in the transaction or was intended to have no interest or had no knowledge of the making of the notes, and the endorsement or assignment of the note in his name, if not made by him, was *in law* a forgery, especially since it is now shown that Seaton was and is an actual person, and the purported assignment was and is *wholly inoperative* and the defendants have no right under the note nor under the deed of trust given to secure the note.

This situation, not disclosed until the hearing, and which could not have been discovered sooner, certainly was one proper to be considered by the court and the

amended and supplemental bill should have been received and filed.

ENFORCEMENT OF UNAUTHORIZED CHARGES BY FORECLOSURE OF TRUST DEED

After the filing of the amended bill and after the dismissal of it, the defendants proceeded to foreclose the deed of trust, not merely for the full $12,500 and interest and some trifling expenses, as in the first notice of sale, but for the sum of $15,729.37, of which the sum of $2,579.43 was money which the trustee declared the Mortgage Company had been obliged to pay out and advance "for the purpose of protecting the interests of said trust" and "in accordance with the terms of said trust deed."

No statement of the particular items of expense nor of the particular purposes of the payments or advances nor of the needs therefor was made in the foreclosure notice, but the proposed amended and supplemental bill states that $2,000.00 of the sum charged against the complainant, the trustor, and its land was for counsel fees allowed by the Mortgage Company to its attorneys for defending this suit—of course only before the district court in the proceedings up to the dismissal of the amended bill, upon motion. This statement is not controverted; nor is the further statement of the bill that the charge "was made, fixed, allowed, and paid (if paid) without the consent, authority, or knowledge of" complainant, (R. 26).

The only authority which the trustee in the trust deed or the beneficiary therein had to pay any money for any

purpose at the cost of the trustor is the deed itself, and that authorizes only the payment of all liens upon the property, including interest due, "which may in their judgment affect said property or these trusts, for the benefit and at the expense of said party of the first part," and "to defend any suit or proceeding that they may consider proper to protect *the title to said property,*" and to pay insurance (R. 99-100).

Whatever discretion the expression "may consider proper" may be deemed to give, it can only relate to suits in which the title is involved, the defense being in the interest of the trustor as well as of the creditors' security. And that discretion, being a *trust,* is not to be exercised arbitrarily, but cautiously, judiciously and in good faith, having especially in view the interests of the one who imposes the trust—the trustor.

The only suit pending or brought, in any way touching the trust property, since the trust deed was executed is this very suit, and it is needless to say that this suit does not menace or affect the title to the property and is nowise directed against it, but is aimed at the defendants and the note they hold, and that in defending this suit they are not defending or protecting *the title to the trust property.*

The maker of a trust deed intended merely to secure the payment of a debt would place himself in a position of undreampt of and unlimited peril, if the trustee, without his concurrence, consent or knowledge, or even against his protest, could successfully claim and exercise the power to pay all the defendants' expenses, whatever he might choose to declare them to be, of defending suits by the trustor against the beneficiary. Such a power

would certainly be a mighty effective suppressor of litigation; it would be cheaper to submit to the first wrong and extortion than to take arms against it.

This case is an illustration. The Complainant thought that it should have some accounting for the $11,965.00 claim assigned by complainant to the then holder of the $12,500.00 note and by him assigned to and held and retained by defendant, Mortgage Corporation, but upon defendants' objection the district judge thought otherwise and dismissed the suit. Thereupon the trustee adds $2,000.00 to the Mortgage Company's demand. Complainant appealed and this Court disagreed with the district court. The case went back, and the district court remained of its former opinion, and straightway the trustee added $3,818.02 to the previous allowance to the Mortgage Corporation. That is what the trustee proposes complainant shall pay the defendants for proving by this Court that the defendants and the district court were wrong. It would have cost complainant only the face of the note and $3,229.37 to accept the decision of the district court—now it is $7,047.39. Appellant may well contemplate with trepidation the cupidity of the Mortgage Corporation, and the liberality of the trustee, if this Court shall decide that the district court, after all, was right.

We submit that the district court erred in rejecting the amended and supplemental bill.

ERRORS COMMITTED AT THE HEARING

THE "OFFSET STATEMENT," Defendant's Exhibit C (R. 107), was admitted in evidence as an estoppel

against the assertion of any claim of credit on account of the $11,965.00 account assigned by complainant and held by the Mortgage Corporation. The admission of the paper for that or any purpose was error.

(a) It does not appear that the secretary of the Paramount Company had any authority to execute any such paper, and certainly no such authority existed in him merely by virtue of his office.

(b) The communication is addressed, not to Mortgage Corporation of America nor even to Walker, but to *Union Bank & Trust Company,* a stranger to all the transactions involved in this suit and unconnected with any of the parties or their affairs. Representations to operate an estoppel in any case must be made to the party setting up the estoppel or to his privies in title and not to strangers.

(c) No estoppel was pleaded; the answer merely states that such a paper was executed and does not state how the Mortgage Corporation came by it; that it was made with the fraudulent or other purpose to influence the corporation to purchase the note; that that corporation relied upon anything stated in it, or altered its position in any way or did or omitted anything by reason of it, or was influenced by it or even knew of its existence. And the paper shows upon its face that none of these essential elements of estoppel *could have been alleged* or *existed,* for the paper declares that "the said note and trust deed *have been assigned* and that the new owner's name is the Mortgage Corporation of America;" and the Mortgage Corporation could not possibly have been misled as to the $11,965 account, for it purchased that along

with the notes and could not have been influenced by the paper or its contents. The paper was not admissible under the pleadings. We do not deem it needful to cite authorities in support of these elementary principles of estoppel.

Walker, when on the witness stand, stated that he received this paper from Mr. Clapp, and that very likely he told him that he had sold the note and deed of trust to the Mortgage Corporation (R. 78), and complainant moved to strike it out for the reason that the sale and purchase had already been made when Walker received the paper, and for other reasons stated, but the court overruled the motion (R. 79).

Mr. Clapp, who as managing director, had conducted all the dealings with Walker, testified that he never saw this paper until the day of his testifying (R. 63). And Norton, the former secretary whose name appears on it, seems to have known nothing about it (*R.* 63).

"An estoppel must be certain to every intent."

Gilmer v. Poindexter, 10 How. 257, 268;
Russel v. Place, 94 U. S. 606, 610;
McCarthy v. Lehigh Valley R. R. Co., 160 U. S. 110, 120.

But this paper is surrounded by confusion and uncertainty as to pretty much everything except that it could not have influenced the action of the defendants, but must have influenced the final decision of the court.

THE NOTICE OF COMPLETION (R. 108), is immaterial to any issue in the case and was improperly admitted in evidence. Nothing depended upon the time or fact of completion of the building or whether or not it had been completed.

THE STOP ORDER (R. 70), was erroneously admitted in evidence, being incompetent and immaterial to any issue in the case.

The order is from one F. S. Lack directed to the Bank of America and dated January 18th, 1926. It purports to forbid the payment of any money out of the improvement fund of Trust 243 (which is the fund of which 40%, up to the sum of $11,965.00, had been assigned to Paramount Motors Corporation of the Pacific and by it assigned to Walker) without Lack's approval first had; but directs the payment of certain small accounts.

If Lack, beneficiary of the trust, had any control over said fund, obviously he had none over that portion of it which had long theretofore been assigned in payment of a valid claim for money borrowed and of which assignment the Bank was advised, and payment of which had been authorized by the "Agent of the Beneficiary," (R. 105) appointed such by the trust agreement (R. 125); and it does not appear that any such control was attempted or intended. If the Bank suspended payment of any part of the fund so assigned, what right had it to do so? And how could Paramount Motors Corporation be responsible for such action of the Bank? Any effect which the Court gave to this paper was erroneously given.

OTHER ERRORS

The other errors committed by the court consist of the findings and the final decision of the case.

This Court held, upon the former appeal, that the amended bill, which the district court had dismissed for "want of equity," plainly stated a case entitling the complainant to equitable relief. That point is settled; it is

the law of the case. And it settles and establishes, as the law of the case, complainant's contention that complainant is entitled to the same relief against the Mortgage Corporation, Walker's assignee, to which it would have been entitled against Walker, had there been no assignment by him.

But the Court below holds that complainant has not maintained the material allegation of the amended bill, and especially finds that "any assignment made by plaintiff to Theron Walker was assignment as collateral only, and not as payment," (R. 42). This, of course, refers to the $11,965.00 matter.

The most of the allegations of the amended bill were in substance admitted and alleged by the answer, and all allegations—setting aside for the moment the assignment matter— were proved. The jurisdictional averments were not denied and the facts appear. Complainant introduced in evidence its Articles of Incorporation (R. 53), the Building Contract with Walker (R. 90), and the execution thereof (R. 51), and the Resolution of the Board of Directors authorizing the same (R. 94), and the execution of the notes and Trust Deeds to Seaton (R. 96), and it was admitted that complainant received no money and no consideration therefor except the building contract (R. 51). The assignment of the $12,500 note by Seaton to Walker is shown by the copy in the answer (R. 13), and Mr. Clapp testified that Walker told him that Seaton was to furnish him, Walker, the $17,000.00 to construct the building, but he had been unable to do so and witness suggested that Walker have Seaton assign the note to whoever would furnish the

money. The assignment of the $11,965.00 account by Paramount Motors to Walker (R. 96) was delivered to Walker by witness Clapp, who has not since seen it, but understands it was placed in the Bank of America which was administering the funds upon which it was drawn (R. 52). The assignments introduced by defendants show that the original was in the hands of the Bank (R. 130). It was stipulated that proceedings to foreclose the $12,500.00 trust deed had been begun.

THE $11,965.00 ACCOUNT

The trial of the cause centered about the nature and purpose of, and the effect to be given to, the assignment by the complainant to Theron Walker Engineering & Construction Company of the debt of $11,965.00 payable to complainant out of funds coming into the Bank of America from the sale of lots in Paramount Heights, Azusa, California, under a trust designated as Trust No. 243, the sum representing moneys loaned by complainant to the Trust or the subdivision enterprise. The complainant contended that the assignment was an absolute transfer of the account in partial payment of complainant's notes held by Walker, and the defendants contended that it was merely collateral security for those notes.

The district court agreed with the defendants' contention and considered that the settlement of that question settled the case. We urge that the court was in error in both respects. If the assignment was not as mere security for the notes, the decree of the court is erroneous; and if it was mere security, still the decree is erroneous.

PRACTICAL CONSTRUCTION OF THE ASSIGNMENT

We are unable to find in the evidence support for the court's finding; there is no evidence except the present statement of Walker that it was taken as security. But what Walker said and did about the time of the transaction and the conduct of the parties *ante litem motam* is a safer guide than what it may now please Walker to say or think.

In 4 Ency. U. S. Supreme Court Reports, page 571, the rule of "practical construction" is stated as follows:

> It is a fundamental rule that in the construction of contracts if the language is doubtful, the courts in ascertaining the meaning of the parties, especially as to the subject matter, should look not only to the language employed, but (1) to the subject matter, (2) the conduct, (3) and situation of the parties as between themselves and with relation to the subject matter, and the surrounding facts and circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. The transaction must necessarily be held to have been entered into with the intention to produce its natural result.

And as to construction by "conduct," there is cited:

> *Old Jordan M. Co. vs. Societe des Mines,* 164 U. S. 261 (270);
> *Lowber vs. Bangs,* 2 Wall. 728 (737);
> *Lowrey vs. Hawaii,* 206 U. S. 215.

And at page 574 it is further said, citing the same cases and others:

> In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, iufluence.

Adding also:

> Where the parties to a contract have by their subsequent conduct given it a construction different from what the law might have given it, the courts will adopt that construction.
>
> *Pine River Logging Co. v. United States,* 186 U. S. 279 (290).

In line with this rule, the Supreme Court of California has declared as follows:

> The contemporaneous and practical construction of a contract by the parties is strong evidence as to its meaning if its terms are equivocal. (Beach on Modern Law of Contracts, secs. 721, 724; 2 Wharton on Contracts, Sec. 653.) "Tell me," said Lord Chancellor Sugden, "what you have done under a deed, and I will tell you what it means." (Attorney General vs. Drummond, 1 Dru. & Walsh 353; H. L. Cas. 837.)
>
> *Keith vs. Electrical Eng. Co.,* 136 Cal. 178 (181); *Williams vs. Ashurst Oil Co.,* 144 Cal. 619 (624).
>
> "Contemporaneous, prior and subsequent conduct and declarations of the parties may be considered in determining the nature of a transaction, as whether a deed was meant as an advancement."
>
> *Neil vs. Flynn Lumber Company,* (W. Va.) 95 S. E. 523.

Consider then the assignment itself and the conduct of the parties in reference to it.

In the first place, the notes were amply secured by the land and by the building, which was to be of the same value as the face of the notes, to be placed upon it. The notes purport to be secured by the deed of trust (R. 12) and not otherwise. There is no reference in the assignment itself to any purpose of security, and there is no reason why additional security should voluntarily have been given Walker, back into whose hands the notes had come. Complainant had secured the contract for the building and had executed its notes and trust

deeds therefor. Complainant's obligations to *secure* the notes had ended; but its obligations to *pay* remained. Provision for that was made.

Now how did Walker understand the transaction *at and after the time it was made?* We have his own evidence upon that point, Defendants' Exhibit K (R. 144), put it in evidence *by the defendants themselves,* and consequently conclusive upon them.

On his own letterhead, advertising his activities, he has prepared and promulgated his prospectus of the "Paramount Motors Project" of which Thereon Walker Engineering & Construction Company is "Manager of Construction." He represents Paramount Motors Corporation as owning 160 acres of land, 100 acres of which is being subdivided into lots for sale, and should bring $400,000.00, about $100,000.00 worth having already been sold, and the money is being paid into the Bank of America and part of it used for the construction of factory buildings, and 20 acres of the land has been placed under a $17,000.00 mortgage to build the first unit, a story and a half building, which has been leased. The prospectus proceeds:

> *Land:* The land is variously appraised at from $900 to $1000 an acre and we are informed that it has been assessed by the County Assessor at $600 per acre.
>
> *Value:* Contract price of the building is $17,000.
>
> *Owner's Value of Land:* $800 per acre—total $16,000, making a total valuation as security of $33,000.
>
> *Re-Payment:* In addition to the land and building as security, arrangements have been made for 40% of all money received from subdivision over selling cost of 15% to apply on this loan through the Bank

> of America. On existing contracts at present in the bank, it is estimated that this should run over $500 a month. In addition to that, an assignment of the lease has been made and this $300 per month will also accrue to the re-payment of the loan. Of the contract price, a first trust deed in the amount of $12,500, dated December 1, 1924, has been placed on, with re-payment of $800 per month, to commence on same under date of August 1, 1925, and continue monthly thereafter until December 1, 1925, on which date the remaining balance is made due and payable. This trust deed carries 8% interest.

The prospectus states that a second trust deed for $4,500.00 has been placed on the property, and states:

> "It is anticipated by the Paramount Motors Corporation that this *entire loan of* $17,000 will be liquidated *in the very near future by the sale of lots* and that arrangements can satisfactorily be made to start the construction of the remaining units of their plant by March 1, 1925."

The $11,965.00 assigned to Walker is part of the 40% of the proceeds of lot-sales mentioned. And the "arrangements" about the 40% is a *repayment* arrangement; the money received is to "apply on this loan"—the $17,000.00 in notes. The land and the building are the *security.*

And Walker says that the Paramount Corporation expected the whole $17,000.00 to be liquidated "in the very near future by the sale of lots." That was Walker's expectation, and he proceeded accordingly to apply the $11,965.00, as he had accepted it, *in payment on said notes.*

Instead of assigning the $11,965.00 account in its entirety along with either deed of trust and "as col-

lateral only, and not as payment," and instead of waiting *until default in the notes had been made,* and then taking steps *to foreclose* on the "collateral," Walker directed the Bank of America, the holder of the fund, to pay off the $4,500.00 note, held by Roper, (R. 132-133), and then assigned the account, except $4,500.00, "which is first to be deducted from the amount of $11,965.00 and made payable in favor of" the $4,500.00 note (R. 130). And in furtherance of the assignment, Walker authorizes the Bank of America to make all payments, out of the account assigned, to Mortgage Corporation of America, the owner of said $12,500.00 trust deed, until the Mortgage Corporation "shall have received from the Bank of America full amount of said assignment, less such amount as has been paid on the second trust deed." (R. 131). It is admitted that the $4,500.00 note at least has been extinguished out of the $11,965.00 fund.

It is submitted that all this is a queer way to deal with mere "collateral security" and shows plainly that not only Walker but Mortgage Corporation of America when they took this account, and dealt with it as they did, took it as payment on the notes, as complainant intended and understood it to be, and never for a moment supposed it to be, as they never for one moment treated it, a mere security for a debt. Their altered interest cannot now alter the nature of the transaction.

Be it remembered that the defendants *still hold the assigned claim* and have never even offered to re-assign or surrender it or any part of it, and the court did not require them to do so or account for it in any way, although holding it to be only "collateral," before per-

mitting them to go on and sell complainant's land for whatever they pleased to claim.

THE DECREE ERRONEOUS EVEN IF THE ASSIGNMENT WAS AS COLLATERAL

We submit that the finding of the court below that complainant assigned the $11,965.00 account to Walker as collateral security is not supported by any appreciable evidence but is contrary to all the evidence; but if it is properly to be considered merely as security, still the decree and the decision of the case are erroneous.

In any case, complainant was entitled, in a court of equity, to some accounting for the claim. Before resorting to a sale of complainant's land, the defendants should have been compelled to exhaust the collateral, personal security, and reduce the amount due upon the note as much as possible. Or at least they should have been required to surrender it. The Anglo Saxon, man or court, has always clung tenaciously to *land*—everything else must be exhausted before than can be touched. It is a wholesome policy, but the court below lost sight of it, and that, we submit, constituted error if no greater one was committed.

CONCLUSION

We respectfully submit that the learned district judge must have been misled by evidence improperly admitted and misinterpreted that which was properly before him, and that the findings and decree of the court below should be reversed and court directed to entertain an amended and supplemental bill.

We urge that Seaton was an element in the note transaction that vitiated the notes, and that whatever valid claims the defendants may have, if any, against complainant must rest upon the building contract and the work done under it and not upon the notes they hold; and the pleadings and records are not in condition to determine such claims.

We beg the Court to consider the plight of appellant, which would be made worse by affirmance of this decree. Appellant began with an obligation of $17,000.00, towards the payment of which it turned over a valid and valuable account receivable of $11,965.00. After that the appellees began foreclosure to enforce payment of about $13,000.00, which, with no new engagement or obligation or liability on appellant's part, was later boosted to $15,729.37 and a little later to $19,547.89. When this Court stayed the threatened sale for the enforcement of the demand for the latter sum, it required of appellant a bond, (which was given) conditioned for this prompt payment of $2,500.00 to appellees upon account, if this Court should affirm the decree appealed from.

What, then, would be the effect of affirmance? Appellant would have to pay the $2,500.00 to appellees, and they would still be more free than before to sell appellant's land to coerce the payment not merely of the sum previously demanded but any sum to which they might please to advance their previous demands. And unless appellant should be able, within some thirty days, to meet whatever the appellees might demand, appellant would be cleaned up of the land and building, the $11,965.00 and $2,500.00 besides.

From such a predicament and calamity surely this Court will save us.

Respectfully submitted,

MAYNARD F. STILES,

CAESAR A. ROBERTS,

For Appellant.